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IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1973

NO. 73-349

WINEGLASS RANCHES, INC.; B.A. YARBRO and ENID W. YARBRO; J.C. RAINERI and (ELEANOR C. RAINERI),

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

Petition for Writ of Certiorari Directed to the United States Court of Appeals for the Ninth Circuit

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TO THE HONORABLE CHIEF JUSTICE WARREN BURGER AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioners respectfully petition for a hearing before this Honorable Court to review and reverse a summary judgment of the United States District Court for the Ninth Circuit, rendered against the petitioners for the sum of $106,887.55, plus interest at the rate of

7-1/2 per cent per annum from June 26, 1966 until paid, plus $1,000 for reasonable attorneys' fees and plaintiff's costs of suit.

The case involves summary judgment to the plaintiff, Federal Deposit Insurance Corporation, in a diversity action suit in Phoenix, Arizona, more than seven years from the date the note was executed and would be barred by the six year statute of limitations of the State of Arizona.

The trial Court made a decision without an oral hearing as required by the rules for summary judgment and based its decision solely on written arguments.

The Court of Appeals for the Ninth Circuit adopted a new rule, Rule 21, which permitted it to ratify the decision below by a memorandum, not for publication.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1254(3), U.S. Codes.

The memorandum opinion of the Court was issued on July 2, 1973.

A petition for rehearing was duly filed within the time allowed by law and denied on July 25, 1973.

This petition is being filed within 30 days thereafter.

OPINION BELOW

The memorandum opinion of the Court, dated July 2, 1973, is attached hereto as Appendix "A" and made a part hereof by reference.

The order denying the petition for rehearing, dated July 25, 1973, is attached hereto as Appendix "B" and made a part hereof by reference.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The following constitutional provisions, statutes, and rules are involved:

Title 28, Sections 1254, 1291, and 1294(4), U.S. Codes.

Rule 56, Federal Rules of Civil Procedure.

Rule 21, Rules for the United States Court of Appeals for the Ninth Circuit.

Fifth Amendment to the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the petitioners were deprived of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States where the Court, in a diversity case, rendered summary judgment against petitioners without an oral hearing and a right to confront and cross-examine the witnesses.

2. Whether petitioners, who borrowed $110,000 from the San Francisco National Bank, could be compelled to pay $150,000 plus interest and penalties and legal fees where they had only received $110,000 and only the benefits of $110,000.

3. Whether two depositors of the bank, who arranged the loan with the president of the bank, were agents of the bank and not of the borrowers.

4. Whether in a summary judgment proceeding the borrowers or their attorney had a right to cross-examine these two depositors as to whether they were agents of the bank at all times.

5. Whether the loan was usurious and therefore void under Arizona law.

6. Whether the petitioners were deprived of due process of law guaranteed by the Fifth Amendment when they were denied oral hearings in both the District Court and in the Court of Appeals.

7. Whether there were several issues of fact which petitioners were entitled to have examined and cross-examined and which entitled them to a trial on the merits and before a jury under the Seventh Amendment to the Constitution of the United States where there were disputed facts both as to the agency of Morris and Garrett and as to the possible participation fraudulently of the then-president of the bank, and as to whether the transactions were usurious and, further, whether they were barred by the statute of limitations of six years in the State of Arizona.

8. Whether the Court of Appeals, in rendering a memorandum opinion on the motion for summary judgment, violated its own Rule 21, adopted and effective March 1, 1973.

9. Whether the findings of fact in the trial Court were and are clearly erroneous and violate Rule 52, F.R.C.P.

10. Whether petitioners were denied due process of law and their day in Court in the absence of a day of hearing as provided by Rule 56, F.R.C.P., and by the Fifth Amendment to the Constitution of the United States.

11. Whether the trial Court acted under a mistake of fact which denied petitioners fair trial guaranteed by the Fifth Amendment to the Constitution of the United States.

12. Whether the Court of Appeals erred in holding that Garrett and Morris were not agents of the Bank.

13. Whether the Court erred in holding that the instrument signed by petitioners was not usurious and void and that the amount claimed by the government is without consideration.

14. Whether the petitioners were denied speedy trial in violation of the Sixth Amendment to the Constitution of the United States.

THE FACTS

Respondent brought this action as receiver of and successor in interest to

the San Francisco National Bank. That bank had been involved in various loans by reason of the activity of its president, Don C. Silverthorne. In U.S. v. Silverthorne, 430 F.2d 675, Judge Barnes stated: "In short, appellant (Silverthorne) was charged with having engaged in numerous loan transactions in 1963 and 1964 as president of the now defunct San Francisco National Bank in which he allegedly diverted, directly and indirectly, portions of loan charges that rightfully belonged to the Bank."

The bank had two depositors, Joseph B. Morris and Bernard S. Garrett, who, it appeared, were friends of the president of the bank, Don C. Silverthorne. It became known to them that Wineglass Ranches, Inc. and Iron River Development Corporation, Inc. (now a defunct corporation and not a petitioner herein) were desperately in need of $110,000 to purchase a judgment known as the Sybil White Stoller judgment.

The petitioners herein lived in Arizona and operated their business in Arizona. They did not know the San Francisco National Bank nor its operations. Morris and Garrett learned of the need of the petitioners for $110,000 to purchase and satisfy the Sybil White Stoller judgment. They met the petitioners in Arizona and said they represented the bank.

Morris and Garrett informed Yarbro that the bank would put up the $110,000 but that it would want the Sybil White Stoller judgment as security and that an escrow would be set up at Union Title Company's office in Scottsdale to consummate the transaction. Morris and Garrett later came down with a note made payable to the bank in the sum of $150,000, together with

a continuing guarantee to the bank in a similar amount, which Iron River and all of the petitioners signed.

When the escrow closed, Wineglass got $110,000. Garrett came down with a cashier's check in that sum made payable to Mr. Garrett. Wineglass did not receive more than the sum of $110,000 at any time.

Morris and Garrett acted for the bank during the course of the entire transaction as none of the petitioners ever did go to San Francisco. (The bank's cashier's check made payable to Garrett was endorsed by him to the escrow agent, Union Title Company, and was deposited by the escrow agent in the Valley National Bank, Phoenix, Arizona, on January 15, 1964.)

Petitioners and respondent both filed motions for summary judgment. The trial Court granted the bank's motion for summary judgment and denied petitioners' motion. Petitioners filed objections to the Court's findings of fact and conclusions of law and made a motion to vacate the summary judgment in favor of the bank and made a motion for a new trial, all of which were denied. Petitioners then filed notice of appeal.

The trial Judge held no hearing in Court on the motions for summary judgment but proceeded upon the written statements and arguments of the parties, setting forth as follows in the findings of fact, conclusions of law and summary judgment (C.T. 111): "This matter having been presented to the Court on cross motions for summary judgment filed by both the plaintiff and defendants herein with supporting materials and the plaintiff, by its attorneys, having

argued in writing its motion for summary judgment; and the defendants, by their attorneys, Raineri, Raineri and Raineri, having argued in writing their motion for summary judgment; ..." (Emphasis added)

The Court had before it an affidavit of one of the petitioners, B.A. Yarbro, in which he stated he had personal knowledge of the following facts, pursuant to Rule 56(e), F.R.C.P., in support of petitioners' motion for summary judgment. This affidavit set forth:

1. That in the early part of January 1964, petitioner Wineglass was badly in need of the sum of $110,000 to purchase the Sybil White Stoller judgment.

2. That he was put in contact with Joseph B. Morris and Bernard Garrett by somebody in California and that the latter came to Arizona and stated to him that they represented the bank, who would loan the money.

3. Morris and Garrett said the bank would want the judgment for security and that an escrow would have to be entered through which the sum of $110,000 would be obtained and the judgment assigned as security for the bank.

4. When the escrow closed petitioners got $110,000 and the judgment was put up as security for the note signed for the bank.

5. The only money received by petitioners was $110,000. Garrett and Morris came down with a cashier's check for $110,000 which was made out to either Morris or Garrett.

6. Morris and Garrett came down with the note from the bank and a continuing guarantee from the bank. (This is the note and continuing guarantee upon which suit was maintained, being in the sum of $150,000 each (C.T. 2-3) and they said that to get the $110,000 from the bank PETITIONERS HAD TO SIGN THE NOTE AND THE CONTINUING GUARANTEE, so they did. Mr. Yarbro had to get Mr. and Mrs. Raineri to sign as they would not accept Wineglass and the signature of Yarbro and Iron River alone.

7. The entire transaction took place in Scottsdale, Arizona. Petitioners never did go to San Francisco to meet with anyone at the bank, as Morris and Garrett acted for the bank in the entire deal.

The respondent failed to respond to the Yarbro affidavit pursuant to Rule 56(e) nor, in compliance with Rule 56(f), did it state any reason why it did not present an opposing affidavit or affidavits, and in view thereof, the facts set forth in the Yarbro affidavit must be accepted and taken to be true. (See: Foster v. General Motors Corp., 191 F.2d 907)

The trial Court awarded the full amount of the face of the note, or $150,000, when it was fully aware, as the record reveals, that no sum of money in excess of the sum of $110,000 was ever delivered to Wineglass to purchase the Sybil White Stoller judgment. In short, the bank has collected $40,000 more from these petitioners than was ever actually delivered to Wineglass, which makes this a usurious transaction, and by virtue thereof the bank has waived all of its rights to interest on the sum of money actually loaned. See Arizona Revised

Statutes, Vol. 14, Section 44-1202, which provides: "No person shall directly or indirectly take or receive in money ... any greater sum ... than eight dollars on one hundred dollars for one year. Any person contracting for, reserving or receiving, directly or indirectly, any greater sum or value, shall forfeit all interest."

The Yarbro affidavit clearly indicates that in order for Wineglass to receive the sum of $110,000 from the bank to save its property, Wineglass and the other petitioners were coerced into signing a note for a sum of $150,000, which quite clearly smacks of a usurious situation or transaction. (C.T. 79-80)

The question of usury was fully and minutely argued by the bank (C.T. 92-95) and such party is not in a position to entertain an objection thereto under such circumstances. See: Federal Practice & Procedure, Wright & Miller, par. 1493, pp. 462, 463, citing in footnote Slavitt v. Kauhi, 384 F.2d 530.

REASONS FOR GRANTING THE WRIT

This case involved a diversity of citizenship action in the State of Arizona, where the statute of limitations of that State bars the plaintiff the right to recover upon a written instrument after more than six years and unless diligently prosecuted.

The note upon which this suit was maintained by the successor to the bank was a demand note which became due upon its execution, to-wit, on January 13, 1964. The action on the note was commenced on Janu-

ary 13, 1969 and no steps were taken to diligently prosecute the action until April 2, 1971, when petitioners were noticed for depositions. This was over 7 years from the date the note was executed, or if respondent takes the position that the note was not due until one year from the date of its execution, it would be more than 6 years from that date.

Section 12-548 of the Arizona Statutes provides: "An action for debt where indebtedness is evidenced by or founded upon a contract in writing executed within the state shall be commenced and prosecuted within six years after the cause of action accrues, and not afterwards."

The foregoing action not having been prosecuted within six years, it is barred by the above statute of limitations. See: Baca v. Bank, 99 Ariz. 352, 409 P.2d 52.

The reasons for speedy trial set forth in the Sixth Amendment to the Constitution of the United States are equally applicable in civil cases as well as in criminal cases. (U.S. v. Marion, 404 US 307, 30 L.ed.2d 468, 484)

Just as the public is concerned with the effective prosecution of criminal cases, so is the public concerned with effective presentation of civil cases. "Just as delay may impair the ability of the accused to defend himself, so it may reduce the capacity of the government to prove its case. See Ponzi v. Fessenden, 258 US 254, 264, 66 L.ed. 607, 613." (U.S. v. Marion, 404 US 307, 330, 30 L.ed.2d 468, 485)

Quoting Justice Brennan, the Marion case further says: "'When is governmental

delay reasonable? Clearly, a deliberate attempt by the government to use delay to harm the accused, or governmental delay that is "purposeful or oppressive," is unjustifiable. ... The same may be true of any governmental delay that is unnecessary, whether intentional or negligent in origin. A negligent failure by the government to ensure speedy trial is virtually as damaging to the interests protected by the right as an intentional failure; when negligence is the cause, the only interest necessarily unaffected is our common concern to prevent deliberate misuse of the criminal process by public officials. Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided - whether it was unnecessary. ...'"

The bank's receivership took place in January, 1965. (C.T. 112) Since that time, respondent has been the duly appointed and acting receiver of the San Francisco National Bank, a national banking association. Since that time many facts occurred which could have been properly the subject of a trial by jury under the Seventh Amendment to the Constitution of the United States. The president of the Bank was indicted and convicted of making various loans. Both Joseph Morris and Bernard Garrett were involved in lawsuits between the bank and themselves and in connection with other banking operations fully known to the respondent.

Whether the $40,000 plus interest, which the respondent is seeking to recover by this summary judgment, was in fact usury under Arizona law was a subject that could well have been tried before an Arizona

jury. Whether it was a finders' fee as contended by the respondent was subject to a trial by jury in Arizona.

As usury does not appear on the face of the instrument, it becomes a question of fact to be proved before a jury. (Maestro Music, Inc. v. Rudolph Wurlitzer Co., 88 Ariz. 222, 229, 354 P.2d 266)

Usury is not one of the specified affirmative defenses required to be pleaded under Rule 8(c), F.R.C.P. Respondent's contention was that the $40,000 left in the account of Garrett and Morris for other disbursements constituted a finder's fee. Petitioners contend that this was a usurious payment to get the loan. This was an issue of fact which should not have been decided on summary judgment, without any oral hearing or without any cross-examination or confrontation of the witnesses.

Any way you slice it, petitioners received only $110,000 to pay off the Sybil White Stoller judgment. By their delay, the government now seeks not $40,000 but $106,887.55.

This Court should grant a hearing to determine that the government cannot engage in this kind of a delay in a civil case, which becomes oppressive and costly and expensive both to the government and to the petitioners.

The Court should also find that the Arizona statute of limitations applies to the respondent and order the judgment below reversed and dismissed.

Petitioners were obviously denied their day in Court. Notice and an opportunity to

be heard are fundamental principles of due process of law. (Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L.ed. 865; In re Gault, 387 US 1, 18 L.ed.2d 527; Sniadich v. Family Finance Corp., 395 US 337, 23 L.ed.2d 349; Randone v. Appellate Department, 5 Cal.3d 536)

The Court of Appeals erred in its opinion in stating that the Yarbro affidavit was defective in that by it the petitioners sought to prove agency based on the declarations of the alleged agents and further said that the uncorroborated declaration of an alleged agent is not sufficient to establish the agency.

The Court of Appeals overlooked the fact that Yarbro's affidavit was corroborated first by Mr. Raineri, who stated under oath that the promissory note was delivered to Morris and Garrett as representatives of the San Francisco National Bank. This was never denied. (C.T. 72) Mr. Raineri is a practicing attorney in Arizona and has been for many years.

Also, respondent admitted by its own request for admissions that the $110,000 in the form of a cashier's check on the San Francisco National Bank, dated January 14, 1964, was used in the escrow to purchase the judgment for the bank. (C. T. 33)

The Bank bought the judgment of $110,000. The escrow shows that Garrett and Morris appear in it as purchasers of the judgment for the bank. (C.T. 81) Garret and Morris therefore could not be agents for the sellers of the judgment in the escrow, which judgment the bank received as security. The trial Court and the

Court of Appeals were therefore in error in rejecting the Yarbro affidavit as uncorroborated to prove the agency of Morris and Garrett for the San Francisco National Bank.

If speedy trial had been afforded these petitioners, the testimony of relevant witnesses could have been available for trial. Under the circumstances, controverting affidavits were necessary. The failure to file them must be regarded as an admission by the respondent that the affidavit is true.

CONCLUSION

We pray for reversal of the judgment below and an order to dismiss the case.

Respectfully submitted,

MORRIS LAVINE

Attorney for Petitioners

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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APPEALS

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff-Appellee, v. IRON RIVER DEVELOPMENT CORPORATION, INC., Defendant, WINEGLASS RANCHES, INC.; B.A. YARBRO and ENID W. YARBRO; J.C. RAINERI and (ELEANOR C. RAINERI), Defendants-Appellants.	NO. 71-2479 MEMORANDUM

Appeal from the United States District Court For the District of Arizona

BEFORE: CHAMBERS and GOODWIN, Circuit Judges, and TAYLOR* District Judge.

Defendants-Appellants, Wineglass Ranches, Inc., B.A. Yarbro and Enid W. Yarbro, his wife, and J.C. Raineri, have

*The Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

appealed from a summary judgment made and entered against them and Iron River Development Corporation, Inc. in favor of plaintiff-appellee Federal Deposit Insurance Corporation (FDIC).

Federal Deposit Insurance Corporation, successor in interest to the San Francisco National Bank (bank), brought this action to recover the balance due and owing on a promissory note in the sum of $150,000, executed and delivered by Iron River Development Corporation and Wineglass Ranches, Inc. to the bank, the payment of which was guaranteed by Yarbros and Raineris. The parties simultaneously filed motions for summary judgment and the trial court granted the motion of FDIC and denied the motion of the defendants.

The only issue presented on this appeal by appellants is whether the trial court erred in granting the motion of FDIC and denying the motion of defendants.

The record reveals that in the early part of January, 1964, Wineglass Ranches, Inc. (Wineglass) and Iron River Development Corporation, Inc. were desperately in need of $110,000 to purchase a judgment known as the Sybil White Stoller judgment. In order to obtain this money, these corporations made and entered into an agreement with Joseph B. Morris and Bernard S. Garrett by the terms of which Morris and Garrett were to procure a loan of $150,000 for the corporations, from which loan the corporations would receive $110,000 and Morris and Garrett would receive the sum of $40,000 for their services and expenses in obtaining the loan. Pursuant to this agreement, the loan from

the bank was obtained in the execution of the note for $150,000 and the guarantees, from which amount the corporations received $110,000 and Morris and Garrett retained $40,000. It is undisputed that the bank disbursed the $150,000, that the note for that sum and guarantees were executed and delivered to the bank and that the $110,000 was received pursuant to the agreement.

Notwithstanding these undisputed facts, appellants contend that Morris and Garrett were acting as agents for the bank as shown by the uncontroverted affidavit of appellant Yarbro attached to appellants' motion for summary judgment. Appellants argue that because of this affidavit, it must be accepted that Morris and Garrett were agents of the bank instead of for the borrowers. Based on this claim, appellants emphatically contend that since they only received $110,000, they should only be liable for that amount and that the note for $150,000 lacks sufficient consideration and is usurious. We do not agree.

The Yarbro affidavit was defective in that by it the appellants sought to prove agency based on the declarations of the alleged agents. The uncorroborated declaration of an alleged agent is not sufficient to establish the agency. See Federal Deposit Insurance Corporation v. Glickman, 450 F.2d 416, 418 (9th Cir. 1971); Flintkote Company v. Lysfjord, 246 F.2d 368, 383 (9th Cir. 1957); United States v. Bensinger Company, 430 F.2d 584, 594 (8th Cir. 1970) and Daly v. Williams, 78 Ariz. 382, 280 P.2d 701 (1955)

The filing of controverting affida-

vits is not necessary when the moving party has not initially demonstrated it is entitled to a summary judgment as a matter of law. See Stubbs v. United States, 428 F.2d 885, 888 (9th Cir. 1970) and Adickes v. S.H. Kress & Co., 398 US 144, 160, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

The trial court found that Morris and Garrett were not acting as agents for the San Francisco National Bank. We agree.

The judgment made and entered is AFFIRMED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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APPEALS

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff-Appellee, v. IRON RIVER DEVELOPMENT CORPORATION, INC., Defendant, WINEGLASS RANCHES, INC.; B.A. YARBRO and ENID W. YARBRO; J.C. RAINERI and (ELEANOR C. RAINERI), Defendants-Appellants.	NO. 71-2479 ORDER

It is ordered that the supplement to appellants' petition for rehearing received July 10, 1973 may be filed.

It is further ordered that appellants' petition for rehearing be, and it is hereby denied.

APPENDIX "B"